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IN THE

Supreme Court of the United States

October Term, 1964.

No. 717.

LEWES DAIRY, INC.,
Petitioner,

v.

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE, and UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Petitioner, Lewes Dairy, Inc., asks that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit entered in its consolidated cases Nos. 14,642 and 14,643.

OPINIONS BELOW.

The opinions rendered in the proceedings before the Secretary of Agriculture are printed in an appendix. Appellants' App. 173a and 210a.[1] The opinion of the District Court on review is unreported and is in an appendix. Appellants' App. 221a. The opinion of the Court of Appeals is as yet unreported and is appended. Petition's App. 1a.

JURISDICTION.

The judgments of the Court of Appeals sought to be reviewed were dated and entered October 6, 1964, in both Nos. 14,642 and 14,643. Petition's App. 11a, 12a. The jurisdiction to review these judgments by writ of certiorari is conferred upon this Court by 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Whether a milk order violates the prohibition against economic trade barriers contained in the Agricultural Marketing Agreement Act of 1937 when, as a consequence of a dairy's introducing some portion of its milk into the regulated market, the order extends the regulatory exactions of that market to all the dairy's business, including the more substantial business it does in an unregulated area where competing sellers are not required to suffer those regulatory exactions?

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1. This refers to pages of the Appellants' Appendix in the Court of Appeals, nine copies of which are filed herewith. The Appellee's Appendix in that Court, nine copies of which are also filed, will be similarly described herein, and the appendix hereto will be designated "Petition's App."

STATUTE AND REGULATION INVOLVED.

The statute is § 8c of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 247,[2] 7 U. S. C. § 608c. The regulation, promulgated by the Secretary of Agriculture under that Act, is Milk Marketing Order No. 127, 24 Fed. Reg. 11071 *et seq.* (1959), now designated Order No. 16, 7 C. F. R. § 1016. Set forth in appendices is the text of the statute (Petition's App. 16a) and the Milk Order (Appellants' App. 112a).

Because the provisions of the entire Milk Order are so inter-related, critical sections cannot be meaningfully extracted. The important subsection of the statute is (5)(G), 7 U. S. C. § 608c(5)(G):

> "No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

In *Lehigh Valley Cooperative Farmers, Inc. v. United States,* 370 U. S. 76, 97 (1962), this Court ruled:

> ". . . [Subsection](5)(G) was compendiously intended to prevent the Secretary from setting up, under the guise of price-fixing regulation, any kind of economic trade barriers, whether relating to milk or its products."

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2. As amended by 50 Stat. 563, 52 Stat. 215, 53 Stat. 793, 56 Stat. 85, 61 Stat. 951, 61 Stat. 707, 710, 62 Stat. 1258, 63 Stat. 282, 68 Stat. 907, 75 Stat. 304, 305, and 76 Stat. 632.

STATEMENT OF THE CASE.

Here attacked, as an economic trade barrier, is that system employed in current milk orders which penalizes a dairy for introducing some portion of its milk into a regulated market by providing, as a consequence, that the exactions of the regulated market will extend to all the dairy's business, including the more substantial business it does in an unregulated area where competing sellers are not subjected to the regulatory exactions.

1. *This Dairy's Operations:* Lewes Dairy, which here makes the attack, operates only one plant which is located in southern Delaware. Appellee's App. 25b. There it processes milk for consumption in fluid form. Appellee's App. 16b and 25b-27b. Lewes purchases that milk from farmers ("producers") located in downstate Delaware, except for supplemental supplies, ranging less than 35% of the total, which it buys from a Pennsylvania dairy (a "handler"). Appellee's App. 26b and 28b.

Lewes distributes the greater part of its production in downstate Delaware. Appellee's App. 27b. There it competes with local handlers which are unregulated, since the southern Delaware marketing area, where they do substantially all their business, is not the subject of a milk order. Appellee's App. 13b, 15b, and 16b. The balance of Lewes' production, which at one time comprised as much as 45% and has since approximated 35%, is distributed in the adjacent part of Maryland which is also on the Eastern Shore of the Chesapeake Bay. Appellee's App. 27b and 34b.

2. *This Order's Application to Such Operations:* Milk Marketing Order No. 127 provides that, as a consequence of the sales Lewes makes in the Maryland market which the Order regulates, Lewes' business is to be subject to full regulation, which means at the least that regulatory charges

are to be exacted upon all of Lewes' purchases of milk supplies.

The features of the Order which do this are similar to those now employed in nearly all market-wide orders promulgated by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937. Milk is classified according to the use made of it by handlers, and each class is assigned a price for regulatory purposes. Milk processed for consumption in fluid form is categorized "Class I." Milk which handlers use to make manufactured products such as cheese is designated "Class II" and is assigned a price less than that assigned to Class I milk. Order §§ 41 and 50, Appellants' App. 127a and 131a.

Full regulation under the Order is imposed upon each "pool plant" of a handler, which is defined as a plant utilizing most of its receipts in Class I form and disposing of as much as 10% in Class I form within "the marketing area." Order § 3(b)(1), Appellants' App. 118a. The marketing area is delineated as the State of Maryland, except for certain of its counties on the Western Shore. Order § 1(c), Appellants' App. 116a.

In regulating pool plants, three techniques are used. First, the Order directs that a "compensatory payment" be made to the Maryland market's "producer settlement fund" upon all milk purchased from another handler, such as Lewes' purchases from the Pennsylvania dairy, without regard to the price actually paid the other handler. Order § 62, Appellants' App. 135a (now revised in amount by Order dated July 22, 1964, 29 Fed. Reg. 10802, 10831 (1964), 7 C. F. R. § 1016). Next, it fixes a minimum price, known as the "blend", which must, at the least, be paid producers for all purchases from them; in effect, the blend is tantamount to a weighted average of the Class prices.[3] Finally, the Order requires a wholly Class I plant like

3. The blend price represents the average of the Class prices, weighted by the amount of producer milk actually utilized in each class by all pool plants during the period involved, and increased by

Lewes to make a payment, equal to the difference between the blend and the higher Class I price, into the Maryland settlement fund upon all producer purchases, regardless of whether competitive conditions had required the handler to pay producers more than the blend.[4]

In summary, because Lewes introduces a portion of its production into the regulated market, it is subjected to the Order's regulatory exactions upon all its purchases, in addition to being required to pay producers the blend price and as much more as its buying competition may require.[5]

3. *This Dairy's Attack Upon the Trade Barrier Effect of the Order:* Lewes' petition attacking the Milk Order was filed with the Secretary of Agriculture, under 7 U. S. C. § 608c(15)(A), on December 31, 1959. Appellants' App. 148a. As amended, it broadly assailed the Order for incorporating the Maryland Eastern Shore. Appellants' App. 152a. It contained other assertions, however, including allegations concerning "the undue, unfair, and discriminatory interference with commerce in milk" and the consequent "derogation of the purposes and policy of the Statute." Appellants' App. 169a.

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the quotient that results from dividing the compensatory payments received by the total amount of such producer milk. Order §§ 70 and 80, Appellants' App. 138a and 140a. For an illustration of this computation, see *Lehigh Valley Cooperative Farmers, Inc. v. United States,* 370 U. S. at p. 89, n. 14.

4. The Order does this by directing each pool plant periodically to contribute to or withdraw a payment from the Maryland fund, depending upon how its total utilization of producer milk at class prices balances out in comparison with the blend price. Order §§ 83-86, Appellants' App. 142a-143a. The purpose is to make each plant ultimately bear the Class price as a minimum for producer milk. The effect upon a Class I plant is to exact the blend-Class I differential on producer purchases. This is substantially the effect upon Lewes, although it does have some minor Class II utilization, as is shown by the periodic reports which form the basis for the enforcement of the Order in case No. 14,642.

5. Lewes was paying farmers approximately as much as the Class I price at the time the record here was made. Appellants' App. 132a and Appellee's App. 30b.

In June 1961 the petition was dismissed. Appellants' App. 210a. Lewes then sought review by filing suit against the Secretary in the Delaware District Court, under 7 U. S. C. § 608c(15)(B). Appellants' App. 213a. During those proceedings, in June of 1962, the decision of this Court issued in *Lehigh Valley Cooperative Farmers, Inc. v. United States,* 370 U. S. 76, explaining that subsection (5)(G) of the Act, 7 U. S. C. § 608c(5)(G), does prohibit a milk order from interposing economic barriers to trade between markets. The review suit thereafter proceeded, on motions for summary judgment filed by the Secretary and by Lewes, to focus upon the effect of *Lehigh.* Appellants' App. 221a. Concurrently, in a companion suit which had been filed by the United States under 7 U. S. C. § 608a(6), the government commenced pressing for full enforcement of the Order against Lewes. Appellants' App. 25a.[6]

The Secretary took the position that subsection (5)(G), as construed in *Lehigh,* did invalidate the amount the Order then prescribed as the compensatory payment charge upon Lewes' purchases from the Pennsylvania handler.[7] How-

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6. Lewes had been joined in the administrative petition by three Eastern Shore Maryland handlers and another Delaware handler, Hollybrook. Upon the petition's dismissal, the Maryland dairies sought review in the Maryland District Court; however, the *Lehigh* decision had no material bearing upon the suit of those dairies, whose business was confined to the regulated market, and their broad attack upon the Order was ultimately denied. See *United States v. Mills,* 315 F. 2d 828 (4th Cir. 1963), *cert. denied* 374 U. S. 832. Hollybrook joined Lewes in the Delaware suit. However, it went out of business in the course of the District Court proceedings. Petition's App. 3a. As to Hollybrook, those proceedings have not as yet been brought to a conclusion, and therefore the appeal from the District Court subsequently described above did not involve Hollybrook as a party, although the caption of the appeal was written to include Hollybrook and the Court of Appeals' opinion speaks of it as though it were a party.

7. Enforcement of this original charge against Lewes was thereafter abandoned. Appellee's App. pp. 3b. The revised charge subsequently prescribed by amendment to the Order is, however, being enforced. See p. 5, *supra.*

ever, the Secretary denied that the principle of *Lehigh* had any bearing upon the feature of the Order which loaded all Lewes' purchases with charges, as a consequence of a minor portion being resold in the regulated area; he urged, instead, that this regulatory system was justified by the earlier Court of Appeals decision in *Titusville Dairy Products Co. v. Brannan*, 176 F. 2d 332 (3rd Cir. 1949). Alternatively, the Secretary argued that the court was not entitled to determine this issue because, he contended, it had not been sufficiently raised in the previous administrative proceedings.[8]

The District Court issued an opinion in the review case which, after reciting that "[b]oth parties have moved for summary judgment, the basic facts being undisputed," decided that the principle of *Lehigh* did prohibit an order for one market from fully regulating a plant doing an inter-market business. Appellants' App. 221a. On the Secretary's appeal, the Court of Appeals reversed. Petition's App. 10a.

The appellate opinion found that Lewes had raised the point before the Secretary, saying that its claims "may be read broadly enough to include the 'trade barrier' issue." Petition's App. 9a. However, it ruled that the record was "without evidence to sustain the factual realities of the legal arguments directed toward the issue" and called for further proceedings before the Secretary in the light of this ruling. Petition's App. 9a. Moreover, in the consolidated enforcement case which had been appealed by the United States, the Court of Appeals directed that Lewes be compelled expeditiously to pay into the District Court registry certain back charges of $92,000 claimed to be due the Maryland settlement fund, in addition to the charges on its current business which Lewes was already

8. The Secretary's main brief in the Court of Appeals, a certified copy of which has been filed here, reflects his position up to that time.

paying into the Court registry. Petition's App. 2a-3a and 10a and Appellants' App. 46a.[9]

The Court of Appeals' mandates upon the judgments entered in the review and enforcement cases were ultimately stayed pending the conclusion of these certiorari proceedings, upon the condition that in the meantime Lewes meet a schedule of payments on the $92,000, which it is doing. Petition's App. 13a. This petition follows.

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9. Actually, a small portion of these charges go to an administrative assessment fund and a marketing services fund rather than to the producer settlement fund.

In any event, in the light of its decision in the review case, the District Court had deferred enforcement of the back charges, which had accumulated before the government commenced pressing the enforcement case. It still required payment of current charges into the Court registry pending appeals. 7 U. S. C. § 608c(15)(B) actually provides that "[a]ny proceedings brought pursuant to section 608a(6) of this title . . . shall abate whenever a final decree has been rendered in proceedings . . . instituted pursuant to this subsection (15)."

REASONS FOR GRANTING THE WRIT.

This case involves the standard form of milk order which, when applied to dairies having only one plant and doing some business inside and some business outside a regulated marketing area, erects an economic barrier that appears to violate the statutory prohibition explained in *Lehigh Valley Cooperative Farmers, Inc. v. United States*, 370 U. S. 76 (1962). A prompt adjudication of the violation is nationally important. The opinion of the Court of Appeals disclaims any adjudication of the merits and yet does so on a ground that has the inevitable effect of declaring that no violation of the trade barrier prohibition is here shown.

1. *The Substantive Question Is Substantial:* In *Lehigh* this Court held invalid, as an economic trade barrier, the amount of a "compensatory payment" charge which an order levied upon milk sold in a regulated market by a handler whose sales in that area were not proportionately large enough to subject it to full regulation.[10] In so holding, the Court reviewed the legislative history showing that subsection (5)(G) of the Act was intended to preclude regulatory interference with the free movement of milk among marketing areas, except insofar as necessary to "put outside milk on an equal footing" with its selling competition in the regulated area (p. 97 of 370 U. S.); as a result, the Court found that the subsection "was compendiously intended to prevent the Secretary from setting up . . . any kind of economic trade barriers." Moreover, when the Secretary argued in *Lehigh* that the charge there involved should be sustained because the handler could have elected

10. Order No. 127 also levied a compensatory payment charge upon sales made in the regulated market by handlers not subject to full regulation, as well as upon purchases made for regulated plants from other handlers rather than producers. Order § 62(d), Appellants' App. 136a.

full regulation as an alternative, the Court ruled that this election "was not voluntary" and "was coercive and, indeed, no election at all" (p. 99 of 370 U. S.).

More recently, in *Polar Ice Cream & Creamery Co. v. Andrews,* 375 U. S. 361 (1964), where a Commerce Clause violation was found in a state milk regulation which denied out of state milk "an equal opportunity to compete" (p. 376 of 375 U. S.), the vitality of the *Lehigh* principle was affirmed. Furthermore, the Court there illustrated the principle by comparing subsection (5)(G)'s prohibition upon the power of the Secretary with the Commerce Clause limitation upon the states. It said (p. 379 of 375 U. S.):

> ". . . This provision, as the Court explained in *Lehigh Valley Coop. v. United States,* 370 U. S. 76, was intended to prevent the Secretary of Agriculture from setting up trade barriers to the importation of milk from other production areas in the United States. We seriously doubt that Congress, in denying the power to the Secretary, thereby granted it to the States."

The *Lehigh* principle is surely violated, and the power of the Secretary exceeded, when a milk order penalizes a plant for making some sales in the regulated market by providing, as a consequence, that it must also bear the exactions of the regulated market on the more substantial business it does in another market, where competing sellers are not required to suffer them. For a Class I plant like Lewes, which sells less than half its production in the regulated Maryland market, the order might as well say that, on what is sold in that area, it must pay into the area's producer settlement fund more than double the regulatory charge exacted from Class I plants dealing solely in the area. Certainly *Polar* would not permit the State of Maryland to regulate in this way and, under its illustration of the *Lehigh* principle, neither can the Secretary.

This barrier effect of full regulation of inter-market plants has been noted by the commentators. See Hutt, "Restrictions on the Free Movement of Fluid Milk under Federal Milk Marketing Orders," 37 U. Det. L. J. 525, 532 n. 27, 556 (1960). Publications of the Department of Agriculture have recognized it. See, *e.g.*, Marketing Research Report No. 98, Agricultural Marketing Service, U. S. D. A. (June 1955), pp. 52-54.[11] And throughout these proceedings the Secretary has described it as a "serious competitive disadvantage" (Appellants' App. 58a), which "could readily induce [a handler] to abandon his sales in the marketing area" (Appellants' App. 96a). See also Appellants' App. 59a-60a, 62a-63a, 191a-192a, 194a, 198a-201a, and 212a.

The Secretary's actions speak even more loudly. In some instances, the Secretary now seeks to minimize this barrier effect upon the inter-market plant by gerrymandering the regulated area, usually by expanding it to encompass what would otherwise be unregulated competition of regulated plants. For example, he based his inclusion of the Maryland Eastern Shore under this Order on the ground that, otherwise, Baltimore dealers would there suffer a "serious competitive disadvantage" from the competition of unregulated plants. Appellants' App. 191a.[12]

Furthermore, the Secretary has tied the Order's regulation to a plant basis rather than a company basis. This, of course, allows a handler large enough to have multiple

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11. In the past this was alleviated, at least on occasion, by confining regulation of outside plants to their sales in the regulated area. See *United States v. Rock Royal Co-Operative, Inc.*, 307 U. S. 533, 565-67 (1939).

12. Of course, this is necessarily an imperfect solution which, if consistently pursued, would lead to uniform national regulation. But the Act specifically contemplates regional rather than national regulation, "unless the Secretary finds [as he has not] that the issuance of several orders applicable to the respective regional production areas or regional marketing areas . . . would not effectively carry out the declared policy of this chapter." 7 U. S. C. § 608c(11)(A); and see § 608c(11)(C).

plants to accommodate to the system by dedicating one or more plants to the regulated area without triggering regulation of all its business.[13]

2. *Prompt Adjudication of the Question Is Highly Important:* The Secretary reports that provisions similar to the ones here in issue "are contained in every federal milk marketing order now outstanding," so that "the effectiveness of federal milk marketing regulation not only in Maryland but across the country will be in jeopardy" if there is a trade barrier violation in this instance. See Supplemental Brief of Appellants, p. 4.[14] This turns upon whether the *Lehigh* principle does control, as Lewes urges, or the earlier Court of Appeals decision in *Titusville Dairy Products Co. v. Brannan,* 176 F. 2d 332 (3rd Cir. 1949), applies untouched, as the Secretary argues.

As a result, all who have commented have recognized the importance of a determination of the question. The Court of Appeals characterized it as "significant." Petition's App. 9a. The Secretary has said that the case "involves a question of great public interest" (Appellants' Opposition dated October 31, 1963, p. 2) and "presents issues of far-reaching consequence in the regulation of the dairy industry" (Appellants' Motion dated March 10, 1964, p. 2). The Amicus which supported the position of the Secretary in the Court of Appeals stated that a determination could "have an impact on the entire federal milk marketing order program throughout the country" (Motion of National Milk Producers Federation filed December 16, 1963, p. 2) and highlighted this in a brief under the caption

13. It has been observed that "[c]oncentration of power in a few large distributors has become an even greater problem today." Hutt, "Restrictions on the Free Movement of Fluid Milk under Federal Milk Marketing Orders," 37 U. Det. L. J. 525, 554 n. 115 (1960).

14. All briefs and papers described herein without reference to an appendix were filed with the Court of Appeals, and certified copies have been filed herewith.

"THE NATIONAL IMPORTANCE OF THE CASE" (Brief of Amicus Curiae p. 2).

This national interest is not only in a decision but in a prompt one. Although deferral of an adjudication for further administrative proceedings might not entail the five years that have passed in the case to date, the time that would be required to bring the case back to this stage would have to be substantial. So long as an adjudication is deferred, handlers such as Lewes must comply with the regulatory requirements. Enforcement against them is available under 7 U. S. C. § 608a(6) and is used, as it was here against Lewes, without regard to the validity of the regulation and without regard to the effect that compliance has upon the handler while he seeks an adjudication of the merits.

In the meantime, the same onus which Lewes is under continues to bear upon small dairies throughout the nation. In fact, the operations of the whole industry daily proceed in transactions which a decision of this substantive issue may require to be unscrambled.

3. *No Valid Legal Reason Requires Deferment of the Adjudication:*

(a) *The factual sufficiency of the record:* The decision of the Court of Appeals, ruling that the record evidence is insufficient, necessarily includes a determination that what is established of record does not disclose a prohibited trade barrier. Such a determination has to be based either upon a misconception of what this record is or upon a view of the trade barrier prohibition that departs from *Lehigh*.

In summary, the critical facts are simply that Lewes is a fluid milk plant which ships 45 to 35% of its production into the regulated Maryland area and yet does all its other business in Delaware. It is also shown, among other things, that Lewes does have competition in Delaware which is unregulated. In any event, these facts are all documented in the record (see p. 4, *supra*); they are not disputed by

other evidence; and they have never been questioned in argument.[15] The Milk Order itself does everything else by requiring, on the basis of these facts, that Lewes contribute to the Maryland fund on all its purchases.[16]

The opinion of the Court of Appeals does not say what additional facts are needed, and it is difficult to foresee what that Court expects Lewes to elicit in further proceedings before the Secretary.[17] Since the statute limits such proceedings to the question whether the Secretary's order is "in accordance with law" (7 U. S. C. § 608c(15)(A), and he so applies it (Appellants' App. 188a), they cannot relate merely to matters of discretion or policy. The Court of Appeals must therefore mean that legality here turns upon whether Lewes can make some demonstration of the actual competitive effect of the regulation upon its business by showing, for example, that its relative competitive position, in one market or another or both, has deteriorated or that some anti-competitive effect of an anti-trust variety has ensued.

Lehigh establishes, however, that the applicability of the trade barrier prohibition does not rest upon any showing of that kind. The opinion there does not recite a finding of what the invalid regulation's effect was upon the

15. Actually, the Secretary did not regard the case as suffering from some fact need, when it was in the District Court. There he had moved for summary judgment and proceeded with Lewes in presenting the case to the District Judge on the basis of adequate factual accord. And in the Court of Appeals, it was not until the last few pages of his reply brief that factual insufficiency was really urged. See Appellants' Reply Brief pp. 11-14.

16. Ironically, there is still no doubt about the critical facts in the companion enforcement case, where they are all shown in the reports which form the basis for there compelling Lewes to make the payments about which it complains in the review case.

17. In pointing out the effect of the Order, Lewes has argued that it is discouraged from the regulated area when, as a consequence of making sales there, it is subjected to burdens on its outside business where its competition is not required to bear them. However, it was referring only to the fact that the Order required it to pay something which the Order did not require outside competition to pay, and nothing more.

competitive position of the parties involved, or any competitive consequences of broader reach. Rather, it turns solely upon the nature of the regulation itself, which required the parties to pay a charge that was not geared merely to put the milk they sold in the regulated market on the same economic footing with other milk sold there but was, instead, fixed so that it could exact more.[18]

Actually, the Court went on to make it quite clear in *Lehigh* that it did not matter that there might be facts on which, in a given instance, the regulation operated to do no more than put the outside and inside milk on a competitive par, for it said in its opinion (p. 98 of 370 U. S.):

> ". . . Nor is the compensatory payment clause saved by the circumstance that in some instances it may also fortuitously operate to put the handlers of pool and non-pool milk on a competitive par. As has been pointed out (note 13, *supra*), there are other means available to the Secretary for achieving this result, while affording protection to pool producers, without imposing almost insuperable trade restrictions on the entry of nonpool milk into a marketing area."

(b) *The raising of the issue:* Although the Court of Appeals found that Lewes' administrative claims included the trade barrier point, the Secretary may here argue otherwise.[19]

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18. In *Lehigh*, the Court noted the record did "demonstrate" that the invalid regulation in fact caused the handler to incur a total cost that exceeded the Class I price for the milk it sold in the regulated market. 370 U. S. at p. 86. Here, the regulation inevitably causes Lewes to incur a total cost exceeding the Class I price for the milk it sells in the regulated market, since, in addition to incurring the Class I price on what it sells there, Lewes must at the very least always contribute to the Maryland fund a regulatory charge on all its purchases which are resold in another market.

19. Actually, the Court of Appeals' judgment directs a remand "for further administrative proceedings consistent with the opinion", which calls for the further development of facts. Petition's App. 12a. If such facts would be superfluous, the Court of Appeals' judgment can hardly be justified on some other basis.

The trade barrier issue was, however, covered by Lewes' administrative petition. Even the Secretary's attorneys characterized the petition's allegations, concerning "discriminatory interference with commerce in milk" (p. 6, *supra*), as charging that "[t]he order is in derogation of the policy of the Act and Commerce Clause of the Constitution, in that it interferes, unduly and unfairly and in a discriminatory manner with commerce in milk." Appellee's App. 19b-20b. In *Lehigh*, the Court ruled such allegations sufficient (p. 98 of 370 U. S.):

> ". . . The administrative petition filed with the Department of Ariculture alleged that the effect of the compensatory payment clause amounted 'to establishing tariffs or barriers interfering with the free flow of milk across state lines,' an obvious reference to the prohibition of § 8c(5)(G)."

A remand of this case to the Secretary would not, in any event, do credit to the exhaustion doctrine.[20] In the administrative proceedings, the Secretary was aware of the problem created by this Order's imposition of its regulatory exactions upon all the business of an inter-market plant.[21] In these review proceedings, the Secretary is a party and has unequivocally asserted that this feature of the Order

20. Actually, the issue here is not one whose prior administrative presentation is legally indispensable. The claim is "one to strike down an order [of the agency] made in excess of its delegated powers and contrary to a specific prohibition in the Act," which the courts can adjudicate in the first instance. *Leedom v. Kyne*, 358 U. S. 184, 188 (1958). Moreover, the decision in *Lehigh* comprised a development in the law between the administrative and judicial phases of the case which conventionally excuses the prior administrative assertion of substantive issues. *Hormel v. Helvering*, 312 U. S. 552 (1941); *cf. United States v. Tucker Truck Lines, Inc.*, 344 U. S. 33 (1952); and see Jaffe "The Exhaustion of Administrative Remedies," 12 Buffalo L. Rev. 327, 354-357 (1963).

21. The Secretary flatly argued to the District Court that, in the administrative proceedings, he "was not unmindful of the economic considerations regarding disposition of milk by regulated handlers outside the marketing area." Appellee's App. 39b.

is "in accordance with law" under *Titusville Dairy Products Co. v. Brannan*, 176 F. 2d 332 (3rd Cir. 1949), and is not touched by *Lehigh*, so that the agency position on the only relevant question has been made altogether clear.

The result, therefore, is a straightforward controversy about the interplay of a decision of this Court and of a Court of Appeals on a question of law having critical bearing upon the current system of federal regulation of an important industry.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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